DEC 9 1980

No. 80-843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CARIBE TRAILER SYSTEMS, INC. and JOHN R. IMMER,

Petitioners,

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE[1]

The Report of the "Governor's Commission" (which was a commission reporting to the Puerto Rico Senate) was not revealed to the case until April 10, 1980, when it

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[1] Pursuant to the provisions of Rule 28(1) of the Rules of this Court, Caribe Trailer Systems, Inc., a corporate petitioner to this case, states that it has no parent company, affiliate or subsidiary.

was included as Exhibits A and B in the *amicus curiae* brief of the Attorney General. During the life of this commission Mr. Francis Kesterman served as a shipping consultant to the Puerto Rico government and spent most of that time in Washington, D.C. (Pet. App. 43a). This was at a time when counsel for Sea-Land, GPRL, McLean and Reynolds "met on occasion with counsel and with representatives of PRMSA in the District of Columbia for purposes of negotiating contract terms" (Brief in Opposition, p. 4).

The report of the Commission predicted a cash flow to the Commonwealth of $1,246.0 million between 1974 and 1985. In its first five years PRMSA has had an operating loss of over $38 million or a loss of $7.6 million per year.

When the Commonwealth attorneys sought a Business Review Letter from the Attorney General they represented that PRMSA would be under the control of FOMENTO, the Puerto Rico Development Agency. They specifically excluded the proposed management contract with a Sea-Land affilliate and never revealed to the Attorney General that a management contract had already been signed with this affilliate (PRMMI). They never revealed (officially) the actual provisions of the PRMSA Act as passed or provided a copy to the Attorney General. The original application was never amended to include PRMSA although PRMSA was in existence prior to July 22, 1974, the date of issuance of the Business Review Letter.

In their amended complaint of July 21, 1978 (C.A. Joint App. 7), petitioners listed 9 specific charges of action taken by respondents in connection with their conspiracy and creation of a monopoly. Respondents had the opportunity to disavow, dispute or question those

charges and other charges of the complaint if they were not true or to initiate discovery to disprove them. They did none of these things. In fact, they admitted to the charges of conspiracy and creation of a shipping monopoly. See Petitioners' Opening Brief before the Court of Appeals, pp. 27-30.

Petitioners participated as intervenors in the proceedings before the Federal Maritime Commission which produced the documents relied upon in this case. Based on these documents, Caribe in 1977 presented a 106-page complaint to the Attorney General charging violations of the Sherman Antitrust Act and other federal laws and regulations. This complaint was directed largely against the Maritime Administration (Marad) which had rejected Caribe's loan guarantee application.

Marad was under the Secretary of Commerce who at that time was Mrs. Juanita Kreps, on temporary leave as a director of R. J. Reynolds Industries, Inc., one of the respondents. Caribe's complaint was handled by Mrs. Patricia Wald, Assistant Attorney General for Congressional Affairs, who later became one of the judges assigned to the panel of the case. Shortly after her assignment to the panel, the Court ordered *sua sponte* the United States to enter an *amicus curiae* brief. Petitioners were notified of this action on the day of oral argument and were not aware of Judge Wald's previous experience with the case until research involved with the reply to the *amicus curiae* brief revealed a letter signed by Mrs. Wald as Assistant Attorney General. A copy of this letter was included as an exhibit to petitioners' reply and sent to all respondents.

Petitioners used the argument of the Commerce Clause before the District Court in their Opposition to Motion for Summary Judgment Filed by Sea-Land Service, Inc.

of August 24, 1978. At p. 3 they cited *Southern Pacific Company v. State of Arizona*, 325 U.S. 761, 769, 65 S. Ct. 1515, 89 L. Ed. 1915 as asserting the supremacy of the Commerce Clause. Both the citation and the argument were ignored by the Judge. The Commerce Clause was argued in their Opening Brief before the Court of Appeals (at pp. 10-12) and in their Reply to Amicus Curiae Brief of May 21, 1980 (pp. 25-28).

Petitioners argued in their Reply to PRMMI and TKM of June 6, 1978 (C.A. Joint App. 97) that "Puerto Rico has no authority to immunize an extraterritorial anti-competitive conduct". Their Reply to PRMSA, PRPA and TTT of May 25, 1978 (C.A. Joint App. 80), had a complete page of argument that the Commonwealth of Puerto Rico could not grant immunity because of the limitations imposed by the Second Puerto Rico Organic Act. The judge ignored the argument and the citations in his decision. Petitioners' argument was resumed before the Court of Appeals in their Opening Brief at pp. 14-21.

REASONS FOR GRANTING THE WRIT

That the type and quality of shipping facilities to the island of Puerto Rico is vital and paramount to the economic health of the Commonwealth is emphasized by respondents as well as by petitioners. There is no argument to the statement (Pet. 10) that Puerto Rico is the largest off-shore maritime customer of the United States.

The basic issue of this case is whether that trade shall be made available to private enterprise or privately financed shipping or shall it be permitted to continue as a government-owned shipping monopoly that is strangling the island. Ancillary is the question of whether or not the Commonwealth legislature can immunize a shipping operation operating beyond its territorial boundaries in such a

way as to restrain interstate commerce between the island and the mainland.

Petitioners will show by brief that the trade has been restrained and that the monopoly has strangled the economy of Puerto Rico. The projections for expansion of trade made by Marad in 1973 (Pet. 10) have not been realized. It is the people of Puerto Rico who have the most to gain by opening up this trade to privately financed shipping and it is the people of Puerto Rico who will pay the price if the monopoly is allowed to continue.

Respondents have not been able to reply to the specific cases cited as being in conflict with the decision of the lower court. They have offered no defense or reply to the array of Supreme Court cases cited in the petition supporting the plea of the petitioners. Their defense remains unsupported by any case law and the few cases presented provide more support for the contentions of petitioners than respondents.

I.

Public Law 62 (PRMSA Act) Is Not a Regulatory Act. It is an Act Setting up a Government-Owned Shipping Monopoly in the Interstate and Foreign Commerce of the Island.

Public Law No. 62 (1974) is not a regulatory act. *Parker* applied the state action concept to a strictly regulatory function and emphasized that no instrumentality of the state was involved in an anticompetitive act. Both cases relied upon by respondents to support state action emphasized the restriction of the theory to a strictly regulatory function and that there must be a policy of "active supervision" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, ____ U.S. ____, 100 S. Ct. 937 (1980) and *New Motor*

Vehicle Bd. v. Orrin W. Fox Co., U.S. 96 (1978). Both cases involved regulatory measures applying only within the state.

Public Law No. 62 receives no benefit from these two cases as it specifically excludes any degree of supervision, control or approval "by any department, division, commission, board, bureau or agency of the Commonwealth of Puerto Rico." (C.A. Joint App. 58).

Public law 62 involves no regulation but authorizes complete ownership and control without limit over the foreign and interstate commerce of the Commonwealth.

II.

That the Lower Courts Did Not Rule on the Validity of the PRMSA Act Under the Second Organic Act of Puerto Rico and the Commerce Clause Was Reversible Error.

Petitioners will show in brief that they presented argument and cited cases before the District Court averring that the PRMSA Act was illegal under the Second Organic Act and under the Commerce Clause of the Constitution. Specific argument to this effect was presented to the District Judge on May 25, 1978 (C.A. Joint App. 80), June 6, 1978 (C.A. Joint App. 97) and Aug. 24, 1978 and both the argument and the citations were ignored. This omission was reversible error.

Before the Court of Appeals petitioners claimed again that the PRMSA Act was illegal and provided no immunity from federal law for any of the respondents. (Opening Brief at pp. 14-22; Reply Brief at pp. 1, 5; Reply to Amicus Curiae Brief at pp. 17, 18—Commerce Clause at pp. 1, 4, 5, 7, 9-12, 15, 25-28 and 34). It was reversible error that the Court of Appeals did not consider the

constitutional question so raised both under Art. 1, § 8, cl. 3 and Art. 4, § 3, cl. 2. Respondents admit at pp. 13-14 of their Reply Brief herein, that these two issues were omitted from the lower decisions leaving only the Supreme Court to consider these constitutional issues.

Judge Gasch ruled on July 8, 1978 that plaintiffs satisfied the requirements of Rule 12(e) of the Federal Rules of Procedure to provide "fair notice of plaintiffs' claim" with an expanded paragraph 22 of the complaint which was filed with the trial court on July 21, 1978 (C.A. Joint App. 7).

The adequacy of plaintiffs' charges was thus ruled on and supported by the lower court and never again questioned. It is too late now to question them. The question of the constitutionality of the PRMSA Act arose automatically when respondents claimed that it gave them immunity from the Sherman Antitrust Act, §§ 1, 2 and 3. Plaintiffs raised this question very early in the proceedings and raised it again before the Court of Appeals.

III.

That Serious Departures from the Usual Course of Proceedings in the Federal Courts Have Occurred Has Not Been Denied or Protested by Respondents.

Charges at Pet. 18-20 that Judge Wald of the appellate panel was previously involved with the case in her capacity as Assistant Attorney General and at that time handled plaintiffs' complaint directed at Marad were supported by a letter signed by Judge Wald which was distributed to all parties. It is not denied that at this time, Mrs. Juanita Kreps, then Secretary of Commerce, was on temporary leave of absence as a director of R. J. Reynolds Industries, Inc., one of the respondents.

The questions raised by petitioners at pp. 18-20 introduce a substantial issue of interference with the federal judicial processes by private litigants. Yet, respondents offer no reply or rebuttal in their reasons why the writ should not be granted.

They ignore the fact that the District Court heard the arguments on the constitutionality of the PRMSA Act but omitted all reference to this issue in its decision. With no protest by respondents the charges that "the judge then proceeded to justify this decision by assertions that were not supported by case law and, in fact, were violative or contradictory of all court decisions pertinent to this area" gain additional weight and indicate a bias.

Not only did petitioners advance arguments challenging the constitutionality of the PRMSA Act before the District Court but in one instance gave it a major heading in its brief filed before the court. In its Reply of May 25, 1978 (C.A. Joint App. 80) petitioners said:

> "B. Assuming a state could establish such an extra-territorial monoply with immunity from the antitrust laws under Parker v. Brown, the Commonwealth of Puerto Rico would not do so because of limitations in the Second Puerto Rico Organic Act."

How could the judge have overlooked such a title at the very top of the page? The question must arise whether or not the omission was deliberate or intentional. This question is supported by the reference by respondents at p. 11 to the decision of the lower court at Pet. App. 25a, 26a: "*Parker v. Brown* . . . involved action by the State of California to raise and stabilize the price of raisins, *ninety five per cent of which were sold outside*

the state. 317 U.S. at 345" [Emphasis added]. This appears as an effort to establish the validity of state action when interstate commerce is concerned even though *Parker* said exactly the opposite and emphasized that the decision involved only local manufacture and specifically excluded matters affecting interstate commerce.

IV.

No Defense Offered to Conley v. Gibson.

Petitioners relied on *Conley v. Gibson*, 355 U.S. 41-46, 78 S. Ct. 99, 2 L. Ed. 2d80 (1957) at pp. 22 and 23 of their petition for their claim that both the District Court and the Court of Appeals had improperly denied their choice of forum district and the benefits of the District of Columbia's "long arm" statute.

Petitioners stated at p. 23, "To reach this decision the Court had to reject the allegations of plaintiffs before any discovery had been allowed which denied plaintiffs the safeguards in this respect assured to them by *Conley v. Gibson, supra.*"

Respondents offer no defense to the guarantees which *Conley v. Gibson* offers except to say (at p. 5) that petitioners did not attempt to initiate any discovery. It is equally true that respondents did not attempt to initiate any discovery. Petitioners, in their Opening Brief before the Court of Appeals (pp. 51-53) charged error of the lower court for failure to accept "plaintiffs' material allegations of fact as true." and cited *Ammerman v. Miller,* 432 F. 2d 621 (D.C.C.A. 1970) wherein a previous decision of Judge Gasch was reversed on this point.

Petitioners relied on the safeguard of having their allegations taken as true and all inferences drawn favorable to them. *Athletes Foot of Delaware v. Ralph*

Libonati Co. 445 F. Supp. 35, 50 (D. Del. 1977) (Cited at C.A.O.B. 51). In brief petitioners will document specific instances where the lower court rejected petitioners' allegations in order to sustain the contrary argument taken in the decision.

CONCLUSION

Respondents as well as petitioners have emphasized the great importance of the issues of this case to the people and economy of Puerto Rico. Respondents' statements that the PRMSA Act was not challenged before the lower court are refuted by the facts and the pleadings. The specific case references cited by petitioners have not been challenged. The few cases they offered in support of their position supported petitioners more than respondents.

For the above reasons the Petition for Certiorari should be granted or summary reversal should issue.

Respectfully submitted,

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